



CONSENT ORDER NEGOTIATION GUIDELINES

Prepared
By

Arizona Department of Environmental Quality
Office of Special Counsel

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Introduction

These guidelines describe the administrative enforcement process used by the Arizona Department of Environmental Quality (ADEQ), including the use of administrative Consent Orders to amicably resolve significant noncompliance. These guidelines are intended to establish reasonable expectations as well, and will be the basis for all Consent Orders entered by ADEQ. As a result, ADEQ highly recommends reviewing this document in detail before the initiation of Consent Order negotiations with ADEQ.

ADEQ's Administrative Enforcement Process

ADEQ will usually initiate the enforcement process by issuing an informal Notice of Opportunity to Correct (NOC) or Notice of Violation (NOV) to a responsible party (usually the owner or operator) describing the alleged violations and affording the responsible party an opportunity either to refute the allegations or to demonstrate to ADEQ that the violations have been corrected. The decision whether to issue an NOC or NOV is based upon the factors listed in A.R.S. § 41-1009(H).¹ While an NOC affords the responsible party an opportunity to correct minor violations without further enforcement, resolving a violation after receipt of an NOV does not preclude ADEQ from seeking civil penalties for the underlying violations. The deadlines for demonstrating compliance within an NOV are firm limits and extensions will not be granted outside the context of a Consent Order. If, for any reason, compliance documentation cannot be submitted within the time frames stated within an the NOV, ADEQ will attempt to negotiate a Consent Order with the responsible party to achieve mutually agreeable time frames for achieving compliance. If attempts to negotiate are unsuccessful and the violations still exist, ADEQ will either issue a unilateral administrative order requiring compliance within a reasonable amount of time or refer the case to the Arizona Attorney General's Office for the filing of a civil complaint which may seek civil penalties.

ADEQ has the statutory authority to issue administrative orders for violations of: 1) ADEQ issued permits; 2) Title 18 of the Arizona Administrative Code (A.A.C.); and 3) Title 49 of the Arizona Revised Statutes (A.R.S.).² There are two types of administrative orders that may be executed by ADEQ: bilateral and unilateral. A bilateral administrative order, otherwise known as a "Consent Order" is issued with the complete written agreement of the responsible party and ADEQ. A Consent Order benefits both the responsible party and ADEQ in that the responsible party has the opportunity to provide input into the terms of the order while ADEQ gets the responsible party's waiver of its right to appeal.

¹These factors include whether the violation: 1) was committed intentionally; 2) is correctable within a reasonable period of time as determined by the agency; 3) represents evidence of a pattern of noncompliance; or 4) poses a risk to any person, the public health, safety or welfare or the environment.

²See A.R.S. §§ 49-261, 49-334, 49-354, 49-461, 49-781, 49-812, 49-862, 49-923, 49-964, and 49-1013.

A "Compliance Order" or "Abatement Order", on the other hand, is an administrative order issued unilaterally by ADEQ without input from the responsible party. The responsible party does not have an opportunity to comment on the requirements of a compliance order. To challenge a compliance order, the responsible party must submit a request for an appeal before an administrative law judge. If an appeal is not requested, a Compliance Order becomes effective and enforceable in superior court 30 days after it is issued by ADEQ. If a hearing is requested it will be held before Arizona's Office of Administrative Hearings (OAH). Following the hearing, ADEQ will review the recommended decision from the OAH administrative law judge and issue a final decision to validate, invalidate or modify the original Order. Once final, the Order becomes effective and enforceable in civil court. Violation of an effective Order may result in significant civil penalties.

Consent Order Negotiation Time Frames

Although ADEQ has a strong preference for negotiating administrative orders over issuing them unilaterally, it will engage in negotiations for only a limited time before resorting to the issuance of a Compliance Order. There are two reasons for limiting the amount of time ADEQ is willing to devote to negotiations. First, ADEQ has under most circumstances already allowed the responsible party a reasonable amount of time to resolve a violation informally during the NOV process. Allowing a significant amount of additional time to achieve compliance is not in the best interest of the integrity of ADEQ's enforcement process or its duty to protect human health and the environment. The second reason for limiting the amount of time ADEQ is willing to devote to Consent Order negotiations is ADEQ's general commitment to a timely and appropriate response for all significant violations of environmental law. In order to fulfill this commitment, ADEQ must limit the amount of time and resources it is willing to spend on a single enforcement action.

As a result, ADEQ is willing to spend 45 days negotiating the terms of a Consent Order. If a mutually acceptable agreement can not be reached within 45 days of the initiation of negotiations, ADEQ will issue a unilateral Compliance Order requiring compliance. The fact that negotiations were unsuccessful will not impact the responsible party's right to a formal administrative appeal of such an order. The 45-day negotiation period may be extended for an additional 15 days, though, if ADEQ decides that the preceding negotiations have been productive and that the additional time will result in a mutually acceptable agreement.

Typical Consent Order Provisions

In an attempt to streamline the negotiation process, ADEQ has developed boilerplate (attached) that is the basis for all Consent Orders negotiated by the Department. In an attempt to avoid unnecessary posturing during the negotiation process, ADEQ has included in its boilerplate various provisions that benefit a responsible party. Although there are a great number of additional provisions that could be included to benefit a responsible party, the provisions in the attached boilerplate are those that ADEQ has already agreed upon through the years (at the

request of various responsible parties) and represent ADEQ's final negotiation position on these issues.

A typical Consent Order contains the following elements

- ! Recitals
These provisions include the name of the responsible party, the facility, the signatory to the agreement, along with a statement that the responsible party agrees not to appeal the order.
- ! Jurisdiction (Section I)
This provision states the statutory authority for ADEQ to enter into the Consent Order.
- ! Findings (Section II)
These provisions describe the facts that lead to the alleged violations of law that are the basis for the Consent Order.
- ! Compliance Schedule (Section III)
This is the "meat" of the Consent Order. It is here where ADEQ and the responsible party agree to the corrective actions that will be taken and the time frames in which they need to be done.
- ! Other Provisions (Sections IV+)
These provisions include: a requirement to submit status reports, consequences of violating the agreement, a description of the limits of coverage, a description of events that will excuse violation of the agreement, ADEQ's right to inspect the facility, where to submit documents, a reservation of legal rights, the severability of provisions, how to modify the agreement, the effective date of the agreement, who is bound by the agreement, and how the order will terminate.

Negotiable Aspects of a Consent Order

Simply put, there are provisions within a Consent Order that are subject to negotiation and provisions that are not. ADEQ may deviate from these guidelines and modify "non-negotiable" provisions only due to extenuating circumstances and upon prior approval from the Office of Special Counsel. The process of obtaining approval from the Office of Special Counsel will prolong the negotiation process, which could jeopardize the 45-day deadline for negotiations. As a result, ADEQ will resist extensive discussions about modifying traditionally "non-negotiable" provisions.

Except for corrections regarding proper identification of the owner, operator, or facility, the provisions within the "Recitals" and "Jurisdiction" are non-negotiable. The responsible party may propose alternate language within the "Findings of Fact" so long as the language is representative of the facts that are the basis for the alleged violations. It is not the purpose of this section, though, to summarize all correspondence and events that have occurred during the enforcement process. Any proposed findings of fact that ADEQ determines to be irrelevant or inaccurate will be rejected. Except for technical corrections in the legal citations used, the

“Conclusions of Law” made by ADEQ are non-negotiable. The “Other Provisions” are also non-negotiable as they represent ADEQ’s final position on the issues as established through years of negotiating Consent Orders.

The section within the Consent Order that will be the main focus of negotiations is the “Compliance Schedule.” To ensure that the Consent Order will be signed prior to the 45-day deadline, the responsible party should propose time frames to achieve compliance as early in the negotiation process as possible. So long as there is no immediate risk of harm to human health or the environment, ADEQ will provide considerable flexibility in establishing time frames for compliance. However, the owner and operator may be asked to provide a written justification for time frames considered exceptional under the circumstances. Although the time frames for completing corrective actions are negotiable, the requirement that compliance be achieved is not.

Unacceptable Consent Order Provisions

Although ADEQ is willing to consider any and all modifications proposed during the negotiation process, suggested changes to the attached boilerplate will be subject to a great deal of scrutiny. Although not intended as an exhaustive list, the following provisions have been proposed by responsible parties in the past and are considered unacceptable to ADEQ:

1. A "dispute resolution" clause or any such language that creates an administrative process for contesting ADEQ determinations. ADEQ is committed to resolving disputes regarding interpretations of Consent Orders in a fair and consistent manner. However, ADEQ reserves the right to make determinations regarding a person's compliance with a Consent Order, and will not constrain itself to a process where any dispute, regardless of its merit, must be formally addressed. To enforce the terms of an order, ADEQ must bring an action in court alleging a violation of the order. As a result, a court will ultimately decide any disputes arising under the Consent Order.
2. Any time constraint placed on ADEQ which is not already specified in statute or rule.
3. Any language that requires the responsible party and ADEQ to "mutually agree" on a deadline that is not specifically stated within the order, or on what constitutes the successful completion of a requirement. The owner and operator may propose a schedule for the implementation of a work plan or corrective action plan; however, unless such schedules are formally agreed upon within the order, ADEQ will determine what is reasonable.
4. Any language that releases the responsible party from civil or criminal liability. Because the only benefit ADEQ receives from a Consent Order is a waiver of the responsible party’s right to appeal the order, the only benefit the responsible party will get out of the order is input into the drafting of the order.³ ADEQ reserves the right to seek civil

³The only possible exception to this general prohibition would be if the responsible party is paying a civil administrative penalty as part of the Consent Order.

penalties and/or injunctive relief, for not only the violations that occur subsequent to the entry of the Consent Order, but also for the violations that lead to the Consent Order in the first place. ADEQ is willing to consider a release from civil liability, but only in the context of a Consent Judgement with civil penalties. ADEQ does not have the authority to release a party from criminal liability.

Consent Order Negotiation Process

Once ADEQ and the responsible party have agreed to initiate negotiations of a Consent Order, ADEQ will send the responsible party a draft Consent Order based upon the attached boilerplate. Although the responsible party may request a face-to-face meeting or teleconference at any point during the negotiation process, the responsible party must ultimately make all suggested changes in writing, either by marking the draft Consent Order, or submitting a "redline-strikeout" version of the draft order. Any suggested changes that are both reasonable and consistent with this guidance will be incorporated into the final Consent Order. To be afforded due consideration, all proposed changes to the order must be submitted to the ADEQ at least ten days prior to the expiration of the 45-day Consent Order negotiation period.

If negotiations reach an impasse, ADEQ will terminate further negotiations and issue a unilateral Compliance Order with what it considers to be reasonable requirements and deadlines. So long as negotiations proceed in a timely and good faith manner, though, and no deliberate attempts by the responsible party are made to delay or otherwise undermine the integrity of the negotiations process, ADEQ will continue negotiations up to the 45-day deadline.

Once finalized, the Consent Order will be sent to the responsible party for signature. The signed order must be returned to ADEQ for signature and execution by the appropriate ADEQ Division Director. The responsible party and any other parties identified on the distribution list, will be sent a copy of the consent order shortly thereafter. Once an administrative order becomes final, it has the same effect as statute or rule in that a violation of the order is subject to the same civil penalties as a violation of statute or rule.⁴ As a result, violation of either a unilateral Compliance Order or bilateral Consent Order could result in significant civil penalties.

⁴See A.R.S. §§ 49-262, 49-463, 49-783, 49-861, 49-924, and 49-1013